

THE REPUBLIC OF UGANDA

IN THE SUPREME COURT OF UGANDA AT KAMPALA

CRIMINAL APPEAL NO.22 OF 2014.

10 [CORAM: J. TUMWESIGYE, S. ARACH-AMOKO, A.NSHIMYE, F. MWONDHA,
L .TIBATEMWA-EKIRIKUBINZA, JSC

15 BETWEEN
KWAMUSI JACOB:..... APPELLANT

VERSUS

GANDA.....RESPONDENT

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[Appeal from the decision of the Hon. Rubby Aweri Opio, Kenneth
Kakuru and F.M.S. Engonda Ntende, JJA, Criminal Appeal No. 0203
of 2009 dated 24th October, 2014]

JUDGMENT OF THE COURT

This is a second appeal from the decision of the High Court delivered by
Lugayizi J on 9th July 2009 Vide *criminal case No 1343 of 2007*.

The background facts:

The appellant was convicted by the High Court of Manslaughter on his
own plea of guilty and sentenced to ten years imprisonment. He appealed against
sentence to the Court of Appeal. The ground of appeal was that the time period he
had spent on remand was not

considered by the High Court trial judge before passing the sentence.

In resolving the above ground, the Court of Appeal *inter alia* stated that:

10 *Although the learned trial judge stated that he had taken into account all mitigating and aggravating factors before passing the sentence, we do not think this was sufficient to cover **Article 23(8) of the Constitution.***

15 *It is clear that the learned trial judge did not specifically state that he had taken into account the period the appellant had spent on remand. We accordingly find that the learned trial judge erred when he sentenced the appellant to ten years imprisonment without taking into account the time he had spent on remand as required under **Article 23(8) of the Constitution.** The sentence is therefore illegal and a nullity and we hereby set*
20 *it aside.*

Having set aside the sentence of ten years, the Court of Appeal in exercise of its powers under **Section 11 of the Judicature Act** imposed a fresh sentence of 12 years after taking into account the remand period.

25 It is this sentence that led the appellant to appeal to this Court on the following ground:

5 **Ground of appeal:**

The Learned Justices of the Court of Appeal erred in law when they enhanced the prison sentence of the appellant from ten years to twelve years.

Representation:

10 At the hearing of this appeal, the appellant was represented by Counsel Andrew Ssebugwawo on state brief while the respondent was represented by Mrs Alice Komuhangi Khauka, Senior Principal State Attorney in the Directorate of Public Prosecutions.

15 Counsel for the appellant adopted written submissions he filed.

The respondent's counsel on the other had made viva voce submissions in reply to the appellant's submissions.

Appellant's submissions:

Counsel for the appellant stated that *Section 132 of the Trial on*
20 *Indictments Act, Section 34 Of the Criminal Procedure Code Act and Rule 32(1) of the Court of Appeal Rules* regulate the exercise of criminal appellate jurisdiction of the Court of Appeal. That the above provisions of law give the Court of Appeal power to confirm or vary a sentence of a lower court but does not give court the
25 power to enhance sentence.

Counsel argued that the Court of Appeal's sentence of twelve years amounted to enhancement of sentence. That such enhancement was irregular because there was no cross appeal from the

5 Respondent. -In: support of this argument, he relied on the

authorities of *Mugasa Vs Uganda SCCA No 10 of 2010* and *Busiku Vs Uganda SCCA No. 33 of 2011*.

In further argument that the enhancement was irregular, counsel
10 stated that the practice of enhancing sentences by courts has the
effect of, 'discouraging convicts from lodging appeals for fear that
their sentences may be enhanced. Counsel therefore prayed that the
appeal be allowed and the enhanced sentence be set aside.

15 Respondent's submissions:

Counsel for the respondent submitted that there was no
enhancement of sentence made by the Court of Appeal. That
enhancement can only be done where there is a legal sentence and
not on an illegal sentence like the present appeal. It was Counsel's
20 argument that the Court of Appeal having set aside the High Court
sentence for failure to consider the remand period, it imposed a
fresh sentence. That on this premise, there was no enhancement
made...

In conclusion, the respondent prayed that the appeal be dismissed
25 and the sentence of the Court of Appeal be upheld.

Analysis and Decision of Court.

The central issue in this appeal is whether Court of Appeal on its
own volition had powers to enhance sentence even where there is no

5 cross appeal. The appellant's contention is that the Court of Appeal erred in enhancing his sentence from ten years as meted out by the High Court to twelve years in absence of a cross appeal from the respondent. The Court of Appeal held as follows:

10 *"Taking all the above into account and the fact that the Appellant had been on remand for a period of one and half years before conviction, we think that a sentence of twelve years would meet the ends of the justice.*

15 *We accordingly set aside the sentence imposed by the trial court and substitute it with a sentence of twelve years imprisonment to run from the date of conviction".*

The appellant, in support of his argument that the Court of Appeal's sentence amounted to enhancement of sentence, relied on the authorities of *Mugasa vs. Uganda SCCA No.10 of 2010 and Busiku vs. Uganda SCCA No 33 of 2011.*

20 In *Mugasa Vs Uganda* (supra), the Court of Appeal enhanced the sentence of the appellant from 17 years to 25years. On appeal against enhancement, this Court was of the view that much as the Court of Appeal had the power to vary a sentence according to *Section 132(1) (d) of the Trial on Indictment Act*, proper
25 sentencing procedure had to be followed when varying sentences imposed by lower courts.

In *Busiku vs. Uganda* (supra), the Appellant's sentence of 12 years was enhanced to 20 years. The appellant challenged the

enhancement in the Supreme Court. The Court in allowing the

- 5 appeal relied on its decision in *weitere Asanisio vs. Uganda SCCA No. 11 of 2010 and Mugasa vs. Uganda* (supra) and held that no universal standard could be set on the procedure appellate courts should follow when varying a sentence imposed by the lower courts.

The Court however, maintained the view in *Mugasa vs. Uganda* that the Court ought to give the appellant advance notice before a sentence is enhanced to be afforded a hearing on the new sentence, in the interest of justice.

We note that much as the above authorities are quite authoritative
15 on the issue of enhancement of a sentence by an appellate court, they are irrelevant to the issue pertaining to the present appeal. The authorities are distinguishable from the circumstances and facts presented in the appeal before us.

20 In the present appeal, the Court of Appeal found that the High Court did not take into account the time spent on remand which is a constitutional imperative when sentencing. Article 23 (8) of the Constitution provides:

*"Where a person is convicted and sentenced to a term of
25 imprisonment for an offence, any period he or she spends in lawful custody in respect of the offence before the completion of his or her trial shall be taken into account in imposing the term of imprisonment. (Emphasis ours).*

5 The Court of Appeal having found that the High Court judge failed to take into account the period of one and a half years the appellant spent on remand, declared the sentence illegal. This court has recently held in *Rwabugande Vs Uganda SCCA No. 25 of 2014*, that, *a sentence arrived at without taking into consideration the*
10 *period spent on remand is illegal for failure to comply with a mandatory constitutional provision.*

We note that the effect of declaring a sentence illegal is that no sentence stands thereafter. The appellate court can thus invoke its sentencing powers as a court of original jurisdiction to impose a
5 new sentence. This is what the Court of Appeal did. In exercise of its powers given under *section 11 of the Judicature Act* and after taking into account the period the appellant spent on remand, imposed a new sentence of 12 years - which is appealed against. What the appellate court would have done was to either remit the
20 case to the High Court so that the sentencing procedure is reopened or the Court of Appeal would have invoked its powers under the *Judicature Act*.

However before invoking the said powers, natural justice demands that before an appellate Court imposes a sentence which is even
25 harsher than the one being set aside, it has to give the appellant an opportunity to be heard on the proposal to impose a higher sentence. The Court of Appeal having failed to observe this fundamental requirement of the Constitution, the sentence it imposed was a nullity. The Court of Appeal with due respect, set

- 5 aside an illegal sentence of the High Court and substituted it with another illegal one.

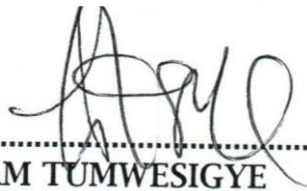
For that reason, the sentence cannot be allowed to stand. We therefore allow the appeal and set aside the sentence of 12 years imposed by the Court of Appeal.

10 Having done so, we note that on 7/7/2009 when the appellant was sentenced by the High Court, the prosecution told court that the appellant had been on remand of 1 72 years. A copy of the charge sheet on the file is dated 2pt November, 2007.

The appellant has been in custody for a period slightly beyond 9 15 years. Considering that he could have benefited from earnings of remission in prison, he could have completed his original sentence of 10 years and released.

In the circumstances, we do not find it appropriate to send the file back to the High Court for consideration of the period he was on remand before resentencing.

We therefore order the immediate release of the appellant if he has not already been released.



.....
JOTHAM TUMWESIGYE
JUSTICE OF THE SUPREME COURT.

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.....
STELLA ARACH-AMOKO
JUSTICE OF THE SUPREME COURT.

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AUGUSTIN E NSHIIMYE
JUSTICE OF THE SUPREME COURT.

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.....

FAITH MWONDHA

25 JUSTICE OF THE SUPREME COURT .

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LILLIAN TIBATEMWA-EKIRIKUBINZA

30 JUSTICE OF THE SUPREME COURT.